No. 15659

United States
COURT OF APPEALS
for the Ninth Circuit

THE OCEANIC STEAMSHIP COMPANY,
Appellant,

vs.

INDEPENDENT STEVEDORE COMPANY, a corporation, and PORTLAND STEVEDORING COMPANY, a corporation,
Appellees.

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the United States District Court for the District of Oregon.

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STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the United States District Court for the District of Oregon, nonsuiting the third party complaint of appellant against appellees following entry of judgment against appellant and in favor of plaintiff in the primary action. The judgment in the primary action is not appealed from.

This Court has appellate jurisdiction under 28 U.S. C.A. 1291.

STATEMENT OF THE CASE

This is a case in which an incredible injustice has been done by denying indemnity to a shipowner, previously held liable to a longshoreman, where the longshoreman was injured solely by reason of a dangerous condition created and then negligently corrected by the third party defendants, although the shipowner had absolutely no active part.

Guy W. Swanson (hereinafter called Swanson), a longshoreman, filed an action in the Circuit Court of the State of Oregon for the County of Multnomah against Matson Navigation Company and The Oceanic Steamship Company (hereinafter called Oceanic), which action was removed to the United States District Court upon the grounds of diversity of citizenship. Thereafter, by order of the Court, Independent Stevedoring Company (hereinafter called Independent) and Portland Stevedoring Company (hereinafter called Portland), were impleaded as third party defendants on a claim for full indemnity in case of recovery by Swanson. Trial was had without a jury before the Honorable Claude H. McColloch, resulting in entry of judgment in favor of Swanson and against Oceanic in the amount of $112,053.66 plus costs and disbursements; and the Court also entered judgment in favor of the third party defendants on the claim of Oceanic for indemnity. Matson Navigation Company was not involved after Oceanic filed its answer. Judgment was entered against Oceanic only.

During the pendency of this appeal the principal action was settled by payment of $90,000.00 and satisfaction of Swanson's judgment against Oceanic was filed and entered.

FACTS

Mr. Swanson was injured while working as a longshoreman aboard the SS VENTURA on the 9th day of February, 1955, at Portland, Oregon.

The ship was a C-2 type vessel owned and operated by Oceanic. It is equipped with steel hatch covers supported on each deck by strongbacks. The hatch covers and strongbacks were provided with the vessel when it was built, in accordance with its original design, except for replacement of individual hatch covers from time to time due to wear and tear and accidental damage. The strongbacks or beams are used to bridge over hatch openings and support the hatch covers. They rest in slots in the port and starboard hatch coamings of each hatch opening, approximately four feet apart, and are formed on the upper side in such a manner as to allow the hatch covers to rest on them at the same level as the deck. The individual hatch covers* are approximately four feet in length, two and one-half feet in width and two inches thick. They are steel, but not solid, having a hollow outer frame and a corrugated or designed surface to increase their rigidity. (Oceanic Exhibit 56—Tr. 228, 229, 230, 231.)

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* These are sometimes referred to as "boards," although not made of wood.

Shortly before the 9th of February, 1955, the vessel was partially loaded at Yaquina Bay, Oregon, by employees of Independent (Tr. 260) who replaced the No. 7 strongback on the lower tween deck in the No. 3 hatch in such a manner that it protruded approximately four inches above the level of the deck instead of resting fully in its housing slots (Tr. 261). As a result, the ends of the hatch covers resting on either side of it were raised above the deck when replaced by employees of Independent. They were caused to be tilted upward the same distance that the strongback protruded above its normal position. The openings on the upper decks were closed by Independent and no notice of this condition was given Oceanic by Independent.

Upon cessation of work by Independent's employees the vessel proceeded to Portland, Oregon where No. 3 hatch was opened by employees of Portland for further loading operations.. The vessel was docked at Terminal No. 4 in the City of Portland for this purpose on the 9th of February, 1955, having come directly from Yaquina Bay (Tr. 261). No work was done in No. 3 hatch after the completion of operations by employees of Independent and the hatch had remained closed until employees of Portland commenced work (Tr. 261).

The plaintiff, Swanson, was a member of the longshore gang assigned to work in No. 3 hatch. He went down to the tween deck with other members of his gang, where they had been directed to stow cargo in the wings. Upon reaching the tween deck the longshoremen, including Swanson, refused to proceed with their work, as they

claimed the deck was unsafe to work upon (Tr. 250). The No. 7 strongback still protruded above the deck level, and the ends of the hatch covers resting on each side of the strongback were tilted upward. It was also claimed that some of the hatch covers were bent, twisted or "dished" (Tr. 250).

A conference was had on the vessel among the members of the longshore gang, the gang boss and the walking boss, all employees of Portland. The walking boss was the chief supervisor and the person having responsibility for directing the stevedoring activities. In the conference held by this group it was decided that a wooden deck would be built over the hatch opening entirely covering the steel hatch covers before loading operations would proceed.

The walking boss left it up to the gang boss and the longshore gang as to whether or not they should switch the No. 7 and No. 1 strongbacks. He left the hold to make arrangements to obtain lumber to "floor" the hatch opening. He went up to the main deck and asked the supercargo, an employee of Oceanic, where he could obtain the lumber and was advised of the location of some lumber. He asked for no assistance from Oceanic to correct the condition. It is clear from the evidence that Oceanic first gained knowledge of the condition of the No. 3 lower tween deck by reason of the inquiry of the walking boss as to the location of lumber. The supercargo, as his title indicates, supervised the work of checking the cargo as to such matters as identification, damage and location.

The supercargo gave no instructions to the employees of Portland to proceed with their work and knew nothing of the changing of the beams until after the accident. After the walking boss left the hatch, the longshore gang, including the gang boss, decided among themselves to remove both the No. 7 and the No. 1 strongbacks and to exchange them. Apparently, they assumed the employees of Independent had confused the two strongbacks and that if their positions were reversed they would fit properly and allow the hatch covers to be level with the rest of the deck.

Without notifying any employee of Oceanic of their intended procedure, and relying upon the authority of their own gang boss, the longshoremen removed two rows of hatch covers at each end of the hatch opening and switched positions of the No. 1 and No. 7 strongbacks. The hatch covers were replaced at the forward end of the hatch by unidentified longshoreman, while Swanson and his partner proceeded to replace the hatch covers at the after end.

Swanson and his partner replaced three hatch covers at the after end of the No. 3 hatch, walking onto the hatch from the starboard side. Then, while they were carrying the next hatch cover to place it in position, Swanson stepped on a hatch cover which they had just put down. Whether that hatch cover had not been placed squarely in position or whether he pushed it when he stepped on it, or whether it slipped for some other reason is unknown and unproved by the evidence. The only known fact is that it moved under his weight and he, the

cover he stepped on and the one he was helping to carry were precipitated into the lower hold. He fell a distance of about seven feet and suffered back and head injuries.

Following the accident all the hatch covers were put in position and the lumber for flooring over the hatch was received and put in place. The men worked on the wooden surface to perform the cargo loading.

The wooden surface could have been put into place without any changing of strongbacks or removal and replacement of hatch covers. The surface would not have been level at the after end, but it would have been perfectly safe. The hatch covers could have been safely covered with lumber even though the hatch covers resting on No. 7 strongback were raised four inches above the deck level. The covered area is so large that a rise of only four inches near the end of the wooden platform would have no effect at all upon the cargo operations.

The Trial Court held that the vessel was unseaworthy, that Oceanic was negligent, and that both the unseaworthiness and negligence were proximate causes of the accident and the resulting injuries to Swanson. The conclusion that Oceanic was liable to Swanson was based upon findings that protrusion of No. 7 strongback above the deck level, which caused the covers resting upon it to be tilted upward, and that the bent, twisted, or dished condition of some of the hatch covers constituted an unseaworthy condition. Oceanic was found to be negligent also because of the same conditions.

There was no proof of any notice to or knowledge of Oceanic of the conditions prevailing at the No. 3 hatch

other than the brief conversation between the walking boss and the supercargo when the walking boss met the supercargo on the main deck and asked for some lumber. The walking boss may have said something to an unidentified ship's officer about the hatch covers, but what he said or when is not known. There is no evidence that a ship's officer urged the longshoremen to work or knew of, much less approved, the manner in which they tried to correct the condition created by Independent.

The employees of Portland, including Swanson and his supervisors, were fully aware of the conditions when they proceeded to correct them. The method which they used was unnecessary and negligently pursued.

The Trial Court held that neither Independent nor Portland was negligent in a manner which contributed to the causing of the accident to Swanson and that neither of them breached its contract to perform its operations in a safe and workmanlike manner. This appeal has been taken from the judgment in favor of Portland and Independent entered upon these findings.

SPECIFICATIONS OF ERROR

1. The Trial Court erred in finding and concluding that the bent, twisted or dished condition of some hatch covers was an unseaworthy condition proximately causing the accident to Swanson.

2. The Trial Court erred in finding and concluding that furnishing or permitting any of the hatch covers to be or remain in a bent, twisted or dished condition was negligence proximately causing the accident to Swanson.

3. The Trial Court erred in finding and concluding that Independent was not negligent and/or that the negligence of Independent was not a proximate cause of the accident to Swanson.

4. The Trial Court erred in finding and concluding that Portland was not negligent and/or that the negligence of Portland was not a proximate cause of the accident to Swanson.

5. The Trial Court erred in failing to find that unseaworthiness of the vessel was a passive condition only and not a proximate cause of the accident to Swanson.

6. The Trial Court erred in failing to find that negligence of Oceanic was passive or only secondary and not an active or a primary cause of the accident to Swanson.

7. The Trial Court erred in failing to find that Independent was a primarily and actively negligent party whose negligence in improperly replacing the No. 7 strongback and the hatch covers resting upon it was a proximate cause of the accident to Swanson.

8. The Trial Court erred in failing to find that Portland was a primarily and actively negligent party whose negligence in permitting its employees to remove and replace the strongbacks and hatch covers and to walk upon the hatch covers while some were removed, instead of merely building a floor over them as they lay, was a proximate cause of the accident to Swanson.

9. The trial Court erred in failing to find that unseaworthiness of the vessel and/or the negligence of Oceanic furnished only a condition to the accident to Swanson

and that neither nor both were proximate causes of such accident.

10. The Trial Court erred in failing to find that Independent was obligated by its contract with Oceanic to perform its operations in a safe and workmanlike manner and that such obligation was breached by Independent by its negligent performance of the work of replacing strongbacks and hatch covers on the tween deck of the No. 3 hatch.

11. The Trial Court erred in failing to find that Independent was obligated by the implied terms of its contract with Oceanic to indemnify Oceanic against loss or harm caused Oceanic by reason of the breach by Independent of its agreement.

12. The Trial Court erred in failing to find that Oceanic was damaged in the amount of $90,000 plus costs and reasonable attorneys' fees by reason of the breach by Independent of its agreement.

13. The Trial Court erred in failing to find that Portland was obligated by its contract with Oceanic to perform its operation in a safe and workmanlike manner and that such obligation was breached by Portland by its negligent performance of its work in allowing its employees, particularly Swanson, to remove and replace the strongbacks and hatch covers and to walk upon the hatch covers while some were removed, instead of merely building a floor over them as they lay.

14. The Trial Court erred in failing to find that Portland was obligated by the implied terms of its con-

tract with Oceanic to indemnify Oceanic against loss or harm caused Oceanic by reason of the breach by Portland of its agreement.

15. The Trial Court erred in failing to find that Oceanic was damaged in the amount of $90,000 plus costs and reasonable attorneys' fees by reason of the breach by Portland of its agreement.

16. The Trial Court erred in entering a judgment nonsuiting Oceanic's action against either Independent or Portland, or both of them.

17. The Trial Court erred in failing to enter a judgment in favor of Oceanic allowing full indemnity against Independent or Portland, or both of them.

SUMMARY OF ARGUMENTS

The errors of the Trial Court involve the principles governing the indemnity owed a shipowner by an independent stevedoring contractor in a case where the shipowner has been held liable to an injured employee of the stevedoring company either on a theory of negligence or on a theory of unseaworthiness of a ship. The settled law requires indemnity be paid on either of two theories: (a) by reason of contract or (b) by reason of active negligence of the contractor operating upon a passive condition.

Each of the stevedoring companies in this case contracted to perform its operations in a safe and workmanlike manner and each agreed to indemnify Oceanic for

any loss or damage suffered by it as a result of breach of first obligation. Each stevedoring company breached those obligations.

The Trial Court erred in holding that the unseaworthiness of the ship or the negligence of Oceanic, or both, were the sole proximate causes of the accident to Mr. Swanson and the losses and damages suffered by reason thereof. Its findings on the issue of proximate cause are clearly erroneous, for the evidence is uncontradicted that each of the stevedoring companies was actively negligent, while any default of Oceanic was merely passive, i.e., the furnishing of a condition, rather than a cause, of the accident. The defaults of Portland and Independent, on the other hand, jointly contributed as proximate causes of accident, although the acts of Portland were subsequent in time.

Either or both of the stevedoring companies are liable to Oceanic on the theory of indemnity due under an implied contractual obligation or on the theory of liability for active negligence.

ARGUMENT

I. A STEVEDORING CONTRACTOR IS OBLIGATED TO INDEMNIFY A SHIPOWNER FOR LOSS CAUSED THE SHIPOWNER AS A RESULT OF THE CONTRACTOR'S BREACH OF AN OBLIGATION TO PERFORM SERVICES PROPERLY.

In *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), it was established that a shipowner, who has been held liable to an injured

longshoreman for either unseaworthiness of a ship or negligence in failing to provide a reasonably safe place to work, may recover full indemnity from a stevedoring contractor whose negligence proximately caused the injury. Liability may be imposed whenever the contract between the shipowner and the stevedore may be interpreted so as to require the stevedore to perform its services in a workmanlike manner. An agreement is implied on the part of the stevedore to indemnify the shipowner if, through failure of the former to perform its services in a reasonably safe manner, someone, such as one of the stevedore's employees, is injured and the shipowner is required to pay damages for the injury.

Portland expressly contracted with Oceanic to indemnify it for the damages Oceanic has been compelled to pay to Swanson, for it agreed to be responsible for any and all loss or injury to persons arising through its negligence or fault. If the promises were not express, they would be implied. The *Ryan* case laid to rest any notion that an express agreement is necessary. It was there stated (pp. 132-134):

> "2. *The other question is whether, in the absence of an express agreement of indemnity, a stevedoring contractor is obligated to reimburse a shipowner for damages caused it by the contractor's improper stowage of cargo.*
>
> "The answer to this is found in the precise ground of the shipowner's action. By hypothesis, its action is not based on a bond of indemnity such as it may purchase by way of insurance, or may require of its stevedoring contractor, and which expressly undertakes to save the shipowner harmless. If the shipowner did hold such an express agree-

ment of indemnity here, it is not disputed that it would be enforceable against the indemnitor. * * *"

"The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

* * *

"See *Union Stock Yards Co. v. Chicago, B. & Q. R. Co.,* 196 U.S. 217; *Brown v. American-Hawaiian S. S. Co., supra; Crawford v. Pope & Talbot, supra,* [1953 A.M.C. 1799, 206 F.(2d) at 792-793]; *American Mutual Liability Ins. Co. v. Matthews, supra,* [1950 A.M.C. 1272, 182 F.(2d) at 323-325]; *Rich v. United States, supra; Bethlehem Shipbuilding Corp. v. Gutradt Co., supra; Mowbray v. Merryweather, supra; Dunn v. Uvalde Asphalt Paving Co.,* 175 N.Y. 214, 67 N.E. 439."

Although the *Ryan* decision gave the ultimate sanction to this theory of liability, it was not an innovation. The theory was applied by this Court in 1926 in *THE ECUADOR (Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co.),* 10 F. 2d 769. Damage to cargo rather than injury to a human being was the cause of loss in

the case, but the shipowner, having been held liable to the damaged owner, was permitted to recover from the ship repairer for its negligent breach of contract which was the proximate cause of the damage.

The Court of Appeals for the Second Circuit also anticipated the *Ryan* decision by allowing the impleading of a ship-cleaning company in a suit brought by its own employee against the shipowner. *Rich v. U. S.*, 177 F. 2d 688 (1949).

This Court further showed the way in *U. S. v. Arrow Stevedoring Company*, 175 F. 2d 329, 333, cert. den. 338 U.S. 904 (1949), where the theory of contractual indemnity was effectuated by permitting the government, as shipowner, to recover from a stevedoring contractor who had been negligent in using a hatch cover known to be defective. In that case, the contract was quite explicit in fixing the relationship of the parties. But the same explicitness is no longer necessary because the *Ryan* rule implies all that is necessary. The result is the same. *All that need be shown to impose liability on the stevedoring contractor is proof that its employees were actively negligent by using equipment known to be defective.* The shipowner may be liable to the injured employee for providing the defective equipment, but the ultimate responsibility is that of the contractor who, with knowledge of its condition, permitted it to be used.

The *Ryan* case was also anticipated by the Court of Appeals for the Third Circuit in *Read v. U. S.*, 201 F. 2d 758 (1953). It was there held that a ship repairer who failed to furnish lights pursuant to its contract was liable

to the shipowner who had previously become subject to a judgment in favor of the ship repairer's employee, even though there was no express provision for indemnity in the ship repair contract. The same court, in *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784 (1953), reiterated the principle of implied contractual indemnity.

Without reference to the *Ryan* decision, its rule was applied in *Pennsylvania Railroad Co. v. McAllister Lighter Line,* 240 F. 2d 423 (CA 2, 1957), where a barge owner, who had a continuing duty of care, was held bound to indemnify a charterer on an implied covenant to maintain a barge, the charterer having previously been held liable to a longshoreman injured by reason of a defect in the deck of the barge.

This Court considered the matter again in *American President Lines v. Marine Terminals,* 234 F. 2d 753 (1956), cert. den., 352 U.S. 926, and relied squarely on the *Ryan* case to permit a shipowner to recover from a stevedore. The shipowner had furnished a hatch beam which was known to itself and to the stevedore to be defective because of the lack of a sound locking device. It was held that whether the breach by the shipowner was negligence or unseaworthiness was immaterial, for the shipowner's breach was a passive and secondary force. The stevedore's activity in proceeding with work without using due care to remove the defective beam or otherwise to protect its employees was negligence for which it was liable to the shipowner on an implied agreement to indemnify for damages caused through breach of its implied obligation to perform its operations in a workmanlike manner.

The Court of Appeals for the Second Circuit most recently followed the *Ryan* doctrine again in *Shannon v. U. S.*, 235 F. 2d 457 (1956). In that case the shipowner had furnished "kinky" cables through the use of which by the contracting stevedore a longshoreman was injured. The stevedore was held to be liable to the shipowner because of breach of the implied promise to remove any known defect or to give notice of the defect to the shipowner so that proper equipment could be furnished. By proceeding with the work when the condition of the cables became known, the stevedore impliedly agreed to indemnify the shipowner for any loss resulting from their use.

In brief, the law as developed through these cases is that if a stevedore undertakes to perform work, and does not expressly preclude indemnity, the court will imply a promise to perform the work in a reasonably safe and workmanlike manner and a second promise to indemnify the shipowner for any loss resulting from a breach of the first implied promise. Knowing use of defective equipment breaches the first promise and the second becomes enforceable.

II. PORTLAND IS LIABLE UNDER ITS CONTRACT.

The contract between Oceanic and Portland is in evidence (Tr. 78). It provides in part as follows:

> "The stevedore hereby accepts such engagement and agrees to do and perform all the work required by it to be done or performed under this contract in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence to protect and safeguard the interest

of the Steamship Company in all respects, and to avoid any delay, loss or damage whatsoever to the Steamship Company.

"*Duties of the Stevedore*—Stevedore shall (a) At all times while the vessel is being worked provide not less than one general supervisor in direct charge of the work on each vessel; load and discharge cargoes, do and perform all the duties and functions usually and customarily done and performed by a stevedore; furnish all labor of every nature and description and all gear, mechanical or other equipment * * * necessary for the most efficient loading or discharging of the vessel, and transport the same to and from the vessel or the pier or terminal where the work is to be performed * * *.

"*General labor and other provisions.* 4-b. The stevedore recognizes the relation of trust and confidence established between it and the Steamship Company by the contract and agrees to furnish his best skill and judgment in planning, supervising and performing the work, to make every effort to complete the work in the shortest time practicable, and to cooperate fully with the Steamship Company in furthering the latter's interest. The stevedore further agrees to furnish efficient business administration and superintendence in performing the work.

4-c. Whenever any actual or potential labor dispute is delaying or threatening to delay the timely and efficient performance of the work, the stevedore shall immediately give notice thereof to the Steamship Company. Such notice shall include all relevant information with respect to such dispute.

* * *

7. As between the parties hereto, stevedore shall be responsible for any and all loss, damage or injury (including death) to persons, cargo, vessels, stores, apparel or equipment, * * *, or other property or thing arising through the negligence or fault of the

> stevedore, its employees, gear or equipment and the Steamship Company shall be responsible for any and all such loss, damage or injury arising through the negligence or fault of the Steamship Company, its employees, gear or equipment."

Portland's express promises to perform work in an efficient manner and in accordance with the best operating practices, to exercise due diligence, to protect and safeguard the interests of Oceanic, and to avoid any loss or damage whatsoever to Oceanic are broader than the promises from which the court implied a covenant to perform work in a workmanlike or reasonably safe manner and a promise of indemnity in the *Ryan* case. These all-inclusive undertakings are further spelled out in the sections relating to the duties of the stevedore and the general labor and other provisions, culminating in the promise that the stevedore (Portland) *shall be responsible for any and all loss, damage, or injury to persons arising through the negligence or fault of it or its employees.* These promises amount to an express indemnity agreement. Even if they did not, all the promises prerequisite to the imposition of liability are implied.

Portland breached its contract.

When the Portland employees got down to the tween deck in No. 3 hatch of the SS VENTURA, they discovered a situation which the Trial Court has found to be dangerous. The chief supervisor of Portland inspected the area because the men would not work. Only Portland employees were present. They all knew of the condition. The walking boss decided upon a method of cor-

recting it, to-wit, building a floor over the hatch covers. The other employees concurred in the decision. The walking boss then left the scene, expressly granting to the gang boss and the ordinary longshoremen their choice as to the necessity or desirability of switching the No. 1 and No. 7 strongbacks.

This was the fateful decision. By refraining from exchanging the strongbacks, the hazard of lifting and carrying the individual hatch covers off and on the hatch would have been avoided. So long as all the covers were in place, none could slide and no one could fall through, but when any cover was removed, the one next to the space could slide. If any had a tendency to tip because of being bent, it might rock a little under foot, but it could not shift out of position so long as all the covers in the row were in place. It was obvious to the Portland employees that there was danger in stepping on hatch boards not secured or locked in place by having the entire row filled up. Notwithstanding that obvious danger, Portland allowed Swanson to walk on the hatch covers while replacing them. Safety was ignored. The covers could have been put on at each side and shoved in toward the middle without walking on them, if it were necessary to handle them at all and to switch the strongbacks; but the quickest and safest procedure would have been to build the floor over the square of the hatch without removing a single hatch cover. Unfortunately, longshoremen do not choose methods of work which consume the least amount of time, and Portland failed to exercise due care in supervising and directing these men, although knowledge of any and all

dangers was imputable to it through the supervisors present.

The decision to switch the strongbacks was made in the absence and without the consent of any employee of Oceanic. The decision was entirely that of the employees of Portland. Everything was under their control. They asked no advice and sought no assistance from Oceanic except a direction as to the location of lumber.

The only active or primary force which came into play was the work of the Portland employees. Oceanic neither participated in the work in any way nor approved it. The Trial Court found some of the hatch covers were defective, but that was a passive condition. Even if the hatch covers were defective, Portland was actively negligent in using them (allowing Swanson to walk on them), with full knowledge of the defect, and thereby became liable just as the stevedore in the *Ryan* and *American President Lines* and other cases cited above.

The action of the gang boss and the longshoremen cannot be reconciled with the duty of Portland to use due diligence, to work in the most efficient manner and in accordance with the best operating practices and to avoid any loss or damage to Oceanic. In addition Portland's employees neglected to use the best skill and judgment in planning, supervising and performing their work, for the chief supervisor failed to exercise his own authority and judgment, leaving the final choice of methods up to the gang itself. Hence, Portland breached its contract, both the express provisions and provisions implied under the *Ryan* decision.

Portland's activities were the primary and active cause of injury to Swanson.

Leaving Independent out of the picture for the moment, as between Oceanic and Portland the defective or dangerous condition of the hatch was obvious and was immediately recognized at the time Portland's employees went to work. It was the cause of the conference between the walking boss, the gang boss and the longshoremen, which resulted in an agreement to correct it by building a wooden floor over it. As the walking boss put it, they "held kind of a little caucus down there" (Tr. 258).

Because of this state of the evidence, the findings of the Trial Court with respect to the proximate cause of the accident are challenged. There is no evidence to support the finding that either negligence of Oceanic or unseaworthiness of the ship was a primary or active force in any way. On the contrary, the evidence is crystal clear that the defective condition of the hatch was a static condition and that Oceanic was absolutely passive. Hence, whether unseaworthiness or negligence was involved, either was only a secondary force, completely superseded by the active negligence of the Portland employees.

The finding that negligence of Oceanic or unseaworthiness of the ship was a proximate cause of injury to Swanson is clearly unsupportable and erroneous. No injury could have occurred if Portland's employees had not acted. They refused to work at first and then, among themselves, determined the method to be followed. The

method they selected resulted in injury to Swanson. They could have refused to proceed or they could have used a safe method. They chose to do neither, but selected the means which allowed them the most work, regardless of the fact that it subjected Swanson to serious and unnecessary risks. Portland cannot escape its responsibility for the result. The careless disregard of the risk to Swanson cannot be reconciled with its *express* promise to perform in an "efficient manner and in accordance with the best operating practices, to exercise due diligence . . . and to avoid . . . loss to" Oceanic. Nor can it be reconciled with the *implied* duty to perform in a careful and workmanlike manner. The breach of these obligations, unknown to and not participated in by Oceanic, caused the accident. For these reasons, Portland is obligated to indemnify Oceanic for the sum paid Mr. Swanson plus costs and attorneys' fees incurred in the action. No other result is possible under the *Ryan* and *American President Lines* cases.

III. INDEPENDENT IS LIABLE UNDER ITS CONTRACT.

The contract between Independent and Oceanic reads in part as follows:

> "The above rates will include the following services of the contractor:
>
> "(a) The supplying of all necessary stevedoring labor including winchmen, hatch tenders and foremen, and all stevedoring direction and supervision requisite or necessary for the proper and efficient conduct and control of the work as well as any equipment and labor needed in switching cars, etc.
>
> * * *

"(c) The removal and replacing of hatch covers, beams, strongbacks at hatches where any stevedoring is conducted; * * *

* * *

"(e) The laying, removing and other handling of all dunnage used or intended to be used in connection with the cargo.

"*Responsibilities of the Parties.*

"All stevedoring work and supervision, and all other services of the contractor under this contract shall be under the sole direction and control of the contractor, providing, however, that the operator and the master or officers in charge of the ship shall always have the right to reject the work if, in the opinion of the master or officers in charge of the ship cargo is so stowed or secured as to make the ship unseaworthy or unfit for her contemplated voyage, or to subject the ship or any of the cargo to unnecessary risk or danger. The contractor will be responsible for loss or damage to the ship, its equipment, and cargo, through or as a result of its negligence. * * * Contractor shall carry insurance against his liability for damage caused through his fault or negligence to the property of others, such insurance to be in the amount of not less than $250,000.00 each action."

The obligations of Independent were similar to, although not expressed as broadly as, those of Portland. Promises to supply all necessary labor and all direction and supervision requisite or necessary for the *proper and efficient conduct and control of the work* are the same type of promises from which the court must, under the *Ryan* case, imply an agreement to perform work in a safe and workmanlike manner and an agreement to indemnify.

Independent breached its agreement and furnished a proximate cause of the accident.

Independent expressly agreed to remove and replace hatch covers, beams and strongbacks and to do so in a proper and efficient manner. Yet its employees failed to replace the No. 7 strongback and hatch covers so that they were level with the deck as they should be. There is no dispute about these facts. The only issue with respect to Independent is whether this breach by Independent was a proximate cause of the injury to Mr. Swanson.

Independent knew or reasonably should have known that cargo operations would have to be carried on in the tween deck of the No. 3 hatch. It is obvious that a ship is unloaded only to be loaded again. It is incontrovertible that Independent knew or should have known that the unsafe condition left by its employees would have to be remedied by the next gang of longshoremen working in that hatch. Independent also knew or should have known that work could be done in the tween deck only if a wooden floor were built on top of the hatch covers or if the No. 7 strongback was properly seated in the slots and the hatch covers laid level with the deck. Either of these procedures was necessitated by the manner in which Independent had done its work. Whatever hazard was involved in removing and replacing the hatch covers, Independent knew of it, for its own men had done that work; yet it left the vessel with a condition which necessitated corrective measures.

As between Independent and Oceanic there can be no dispute that the only party responsible for the creation

of the dangerous condition was Independent itself. If Independent had properly replaced the strongback and hatch covers, Swanson and his fellow employees would have had no reason at all to remove and replace them. The danger to which Swanson was subjected by Portland would never have arisen. Oceanic was liable to Swanson because it owned the ship, but the creation of the dangerous condition with which Oceanic was charged was solely the result of the negligent performance by Independent's employees of the work they were hired to do. Oceanic played no part in the creation of the dangerous condition. Hence, as between it and Independent, there can be no argument that the part played by Oceanic was merely passive and secondary.

It cannot be gainsaid that Swanson would not have been injured if Independent had done its job properly.

IV. OCEANIC DID NOT CONTRIBUTE TO ANY PRIMARY OR ACTIVE CAUSE OF INJURY.

The injury to Swanson was caused by a combination of the negligence of Independent in creating a condition which called for correction and the negligence of Portlay, or, allowing for the propensity of longshoremen to correct it. Portland could have floored the hatch as it lay, or, allowing for the propensity of longshorement to prolong work, it could have acquiesced in their desire to exchange the strongbacks and still have done so safely by replacing the hatch covers from each side, row by row, instead of allowing men to walk on them when they were subject to sliding because they were not all in place, locking each other against the hatch coamings.

The chief supervisor knew the condition could be corrected safely without removing hatch covers, but abdicated his own authority and common sense by allowing the men the option of choosing the other method. Then, when they decided to switch the strongbacks, he failed to stay on the job to see that they didn't walk on hatch boards which were subject to sliding or shifting in any row that was only partially filled. Neither of the safe procedures would have subjected the injured man to the risk which resulted in his fall.

Oceanic was an innocent bystander, placed in the unfortunate position of being absolutely liable for a condition which it did not create and did not control. The real question before the Court should be whether liability for indemnity is Portland's only or whether Portland and Independent should be held liable jointly. This is a matter of causation.

In dealing with the question of causation, the Restatement of Torts specifies in Section 433 the elements to be considered in determining whether conduct is a substantial cause in bringing about harm to another. These elements are as follows:

> "(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
>
> (b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;
>
> (c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has

created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(d) lapse of time."

In applying the first factor to this case, it is obvious that the carelessness of Portland's employees in subjecting Swanson to the risk of walking on the hatch boards on a partially filled row was a primary factor and had the immediate effect of producing his injuries. That negligence was the last link in the chain of causation. The carelessness of Independent in replacing the No. 7 strongback and the hatch covers resting upon it in a faulty manner was the preceding link. It contributed to producing harm to Swanson because the dangerous condition required corrective action.

If the bent or twisted condition of any of the hatch covers contributed to the accident in any way, it was merely a passive condition upon which Independent and Portland subsequently acted. If Independent had placed the strongback properly in its slots and put the hatch covers down flat, the way they were before Independent's employees worked on them and the way Portland's men eventually put them, the bent condition of some of the hatch covers would have been completely harmless. It would have been impossible for Mr. Swanson to have sustained the injuries which he did. If the hatch covers had not been removed, Swanson could not have fallen through the opening. The condition of the hatch covers themselves could have had no effect whatever if some had not been removed. Whether they were bent, twisted or "dished" had no active part in the causation of the accident. Even if it were necessary or desirable to put

a floor of lumber on top of them, no one could have fallen through. There was no danger of that until one or more were removed and someone walked on others near the opening. There would have been no such removal if Independent had done its job or if Portland had used a safe method. Therefore, by the first test of the Restatement, Oceanic is not responsible for a proximate cause.

Using the second test, looking back from the harm to the negligent conduct of Portland, it does not appear extraordinary that a steel hatch cover resting with one end on a steel hatch coaming and the other on a steel beam could slide from the pressure of a man stepping on to it, if it were not blocked in place. It is no surprise that the negligence of Portland in permitting or ordering Swanson to walk on a hatch cover, insecure because it was next to a blank space, should have resulted in harm. Similarly, it is no strain on reason to see that the negligence of Independent produced a situation which required correction. On the other hand, Oceanic's innocence of the creation of the condition and of the means taken to correct it makes it impossible to urge that the covers alone, if properly put in place, could have been expected to bring about harm.

By the third test, Portland's negligence is plainly seen, for the activities of its employees were continuous up to the time of the injury to Swanson. Although Independent was not active at the time the harm resulted, it created a situation which continued until it was joined by the active negligence of Portland; then the combination of the condition negligently created by Independent together with the active negligence of Portland produced

the harm which befell Mr. Swanson. Again the situation of Oceanic differs. The bent or twisted condition of the hatch covers was harmless, if not acted upon by the others. The covers had been in use for a long time and had not been the subject of any complaint known to Oceanic. When the strongbacks were properly seated and the covers laid in place, they locked each other in position so that no slipping or sliding was possible which would permit a person to fall into the hold. They had to be acted upon by others to have any connection with the accident to Swanson.

The factor of lapse of time relieves neither Independent nor Portland of its responsibility. There was no intervening period of time during which the effect of either's carelessness became attenuated or unknown factors may have come into operation.

The second test referred to above was transferred to Section 435 in the 1948 Supplement to the Restatement, which now reads as follows:

> "(1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.
>
> "(2) The actor's conduct is not a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

The test under the second part of the revised Section 435 is the same as under the second part of Section 433. The first division of Section 435, dealing with foreseeabil-

ity of injury, does not define proximate cause but simply eliminates foreseeability as an important factor.

The most that need be shown is that some risk was foreseeable, not that the particular type of accident would happen. See *Smith v. Shevlin-Hixon Co.,* 157 F. 2d 51 (CA 9, 1946).

As between Swanson and Oceanic, the latter has been found legally responsible for the results of the stevedoring contractors' negligence, but, as between Oceanic and each of the contractors, whoever is responsible for the proximate cause of the accident must respond in a claim for indemnity.

Since both Portland and Independent were both negligent and the negligence of each proximately contributed to the accident of Swanson, let them argue whether only one or both should answer in indemnity. As to Oceanic, the negligence of each was an intervening and active force.

In determining Oceanic's connection to the ultimate result,

> "A better analysis is to regard the intervening force [acts of Independent and Portland] as a risk or hazard and to ask whether its foreseeability was such as to make defendant's [Oceanic's] act negligent with regard to it. It is better, in other words, to inquire whether defendant's duty extends to such a risk as the intervening force, because the question in this form focuses attention on a more significant and less fictitious problem than that of cause." 2 Harper and James on Torts, 1143.

This test helps determine the extent of Oceanic's duty. Did it extend so far as to require Oceanic to an-

ticipate that Independent would create the dangerous condition by failing to seat a strongback which competent longshoremen could place in position? Did the decisive duty extend so far as to require it to foresee that Portland would use a careless method of correcting the condition? When the duty is conceived in these terms, it is plain that Oceanic played no active part and the negligence of the other parties intervened and became the only active causes.

The only thing pertaining to Oceanic which could be complained of is the hatch covers themselves. The strongbacks were satisfactory; the fact that they were properly seated in position when replaced by Portland's men is conclusive. The Trial Court relied on proof that some hatch boards were bent, twisted or dished, but failed to make any suggestion as to how their condition had any connection with the failure of Independent to seat No. 7 strongback. There was no connection, of course. Likewise, the Trial Court failed to make any finding or suggestion as to how the condition of the hatch boards had any connection with the failure of Portland to build a floor on the square of the hatch without exchanging strongbacks, or how their condition required that Swanson walk on them.

How the Trial Court could reason that the hatch covers, bent or flat, were a proximate cause, is inexplicable. The part they played was passive. Whatever danger they presented was known, yet the two contractors ignored the risks and set the stage for the accident. Any finding conceiving the hatch covers themselves to be the cause of the accident is wholly inconsistent with

the evidence. If Independent had not carelessly replaced the strongbacks, No. 7 would not have been raised three or four inches out of place. If No. 7 had not been raised out of place, Portland's men would not have taken off four rows of covers and exchanged No. 1 and No. 7 strongbacks. If the hatch covers had not been taken off, Swanson would not have fallen. The case is as simple as that. Even if enough of the hatch covers were bent or twisted or dished so that the square of the hatch needed to be covered with lumber for a good working surface, that task could and would have been safely done without any risk at all to Swanson. It was not the condition of the hatch covers which caused a risk and an accident; it was the removal and replacement of them which did that. The removal and replacement was necessitated solely by the acts and decisions of the stevedoring contractors.

Portland was the more flagrant violator for it could easily have avoided any risk and overcome the effect of Independent's wrongdoing. Portland was in exactly the same situation as the contractor in the *American President Lines* case, of whom this Court said:

> "Marine was in full control of the work and was in charge of this very situation. After Marine was notified of the defective beams by the shipowner, the shipowner did nothing to increase the hazard or to cause the breach of contract by Marine. Marine openly and plainly breached its obligation to perform its work in a safe manner. We think it is no defense to that breach that American supplied the defective beam. The record shows that the negligence of the shipowner and the unseaworthiness of its ship were passive and secondary forces in causing the injury to Williams, and that the breach of

obligation by Marine was the sole active or primary conduct causing the injury.

* * * * *

"We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence or of the ship's unseaworthiness, and in face of all that proceeded to breach its duty so as to make that negligence an immediately dangerous force." (p. 759)

Even if the finding of defective hatch covers as a cause were not in itself reversible error, the Trial Court ignored the *Ryan* and *A. P. L.* cases by failing to impose liability on Portland for using the defective equipment with full knowledge of the defects. The evidence on that point is clear, positive and uncontradicted. It may not be ignored and it requires that Portland indemnify Oceanic for its carelessness. It has been held in all the leading cases that the obligation to perform services in a safe and workmanlike manner is breached by knowingly using defective equipment.

V. A STEVEDORING CONTRACTOR IS LIABLE FOR INDEMNITY TO A SHIPOWNER FOR HARM RESULTING FROM ITS ACTIVE NEGLIGENCE.

Each of the stevedoring contractors is liable upon a separate and independent basis from the implied contractual indemnity theory of the *Ryan* case. This second theory has been well established by this Court in the two cases entitled *United States v. Arrow Stevedoring Co.*, 175 F. 2d 329 (1949), and 175 F. 2d 333 (1949). In

each case there was an express contract of indemnity between the shipowner and the stevedoring company. In the first case, a longshoreman named Williams was injured by the falling of a metal hatch cover on the SS EDGECOMBE, a vessel owned by the United States. The hatch cover was intended to be secured in a raised position by two dogs held by pins. Both dogs were defective and their pins absent. As a result the dogs could not hold the heavy hatch cover erect, when raised by the longshoremen in the course of their work, and it fell on Williams. The District Court found that the defects were unknown to Arrow and denied indemnity, but the Court of Appeals ruled that the finding was clearly erroneous and reversed the judgment, allowing full indemnity. The court said:

> "It is thus apparent that Arrow's supervisor knew that the ship would do nothing about the cover of port hatch No. 4 until 'sometime' during the day shift. Assuming that this transferred to the ship, to perform sometime in the morning shift, the obligation of Arrow's contract, later considered, to raise this hatch door, Arrow clearly owed the duty to see that none of its stevedores should work under it until the danger known to exist was removed. Certainly the ship had no obligation to do more than it promised, that is to rig the door *sometime during* the day shift, not before the shift began to work." (p. 331)

The court went on to state that the defective condition could have been corrected, and summarized as follows:

> "On the facts we find that the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door with knowledge of its defects of dogs and pins. The government in no

> way participated in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow's Larsen. (Citing cases.)" (p. 331)

In the second case, the Court of Appeals rejected as clearly erroneous the finding of the District Court that the hatch cover had not been placed or arranged or secured or maintained in a careless or reckless or negligent manner by Arrow. The evidence that the supervisors for Arrow knew of the dangerous situation and proceeded to have their men work and that such work was not known to the ship's officers made the negligence of Arrow the sole proximate cause of the death of one Mitchell.

The case at bar cannot be differentiated from the *Arrow* cases, as regards the liability of Portland. In each one there was a known danger when the longshoremen went to work. There was also a known method of correcting the condition without subjecting anyone to the risk of walking on an unsecured hatch cover. Without notice to the shipowner, the stevedore in each case negligently chose to follow a dangerous procedure and injury to a man resulted from it. The only difference in the cases is that the danger here was created by Independent rather than the shipowner. This does not relieve Portland; it makes Independent a joint tort-feasor. The wrong committed by Independent continued in effect and had the wrong of Portland added to it. Portland had an opportunity to avoid risk to Swanson by using a safe method, but its failure to do so combined with the result of Independent's negligence to produce the injury

to Swanson. No matter how it is viewed, Portland cannot escape liability. It is in exactly the same position as Arrow and is obligated to indemnify Oceanic.

Two years after the *Arrow* cases this Court decided *United States v. Rothschild International Stevedoring Company,* 183 F. 2d 181. There the plaintiff was working on the tween deck of a ship, guiding a strongback into its slot on the port coaming, when the strongback fell and injured his hand. An employee of the stevedore testified that the ship's winches had slipped during previous use and that he had reported the matter to the ship's electrician and had warned the winch operator that the port winch was defective. Apparently nothing had been done about the situation by the shipowner. The District Court allowed judgment in favor of the plaintiff and denied indemnity against the stevedore. This Court reversed the latter ruling, saying:

> "It is clear that both United States and Rothschild were negligent. It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. With this knowledge Rothschild should not have permitted Dillon to work in this dangerous circumstance as to which it was fully informed. * * *
>
> "It is clear from the undisputed evidence that Rothschold used its discretion in permitting Dillon to work where it knew there was a defect which was dangerous, relying upon chance that nothing would happen. * * * The winches were defective without any question of a doubt and whether they failed to work satisfactorily in stopping or upon or after stopping does not materially affect the situation. * * *
>
> "We think the uncontradicted testimony of the

case entitles the United States to full indemnity over." (pp. 182-3)

Although it was not expressed in these precise terms, it is clear that the Court allowed indemnity on the theory that the shipowner was only passively negligent while the stevedore was actively negligent in permitting its employees to use a winch which it knew was defective.

These cases cannot be distinguished from the present one, and on their authority the judgment denying recovery by Oceanic must be reversed.

CONCLUSION

The law is now established beyond cavil that a stevedoring contractor who fails to perform services in a safe and workmanlike manner is liable for indemnity to a shipowner who has been compelled to pay damages to a man injured as a result of the carelessness of the contractor. That defective equipment was furnished by the shipowner is no defense in the action for indemnity if the defect was known to the contractor and the equipment was nonetheless used. The contractor's negligence in using the defective equipment is the proximate cause of injury to its employee and the passive negligence or unseaworthiness is not.

In this case there was more than a defect in some hatch covers. There was a creation of a dangerous condition by one contractor and a negligent procedure in correcting it by the other. The dangerous condition, like

the defective equipment in the leading cases, was known to the second contractor and it failed to use due care after becoming fully aware of the situation. It is pure speculation as to whether the condition of any hatch covers had any connection with the accident, but that issue is immaterial. The evidence is clear that the defects in any hatch covers were innocuous and would have continued to be so if the active negligence of the two contractors had not supervened.

Findings of the Trial Court on the issues of causation are clearly erroneous and must be set aside. The third-party defendants are obligated to indemnify Oceanic on either the implied contract theory or the active-passive negligence theory.

Respectfully submitted,

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APPENDIX

Exhibits identified, offered and received as evidence.

All Exhibits offered and admitted, Page 78 Transcript.